



CENTRAL LIBRARY

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April 22, 2011

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445-12th Street, SW
Washington, DC 20554

CC Docket 02-6
CC Docket 96-45

REQUEST FOR REVIEW AND REQUEST FOR WAIVER

Dear Ms. Dortch:

We are filing this letter as a Request for Review of the Administrator's Decision Letters on Appeal issued on February 25, 2011, and a Request for Waiver of the Commission's rules with respect to the below-cited Forms 471.¹

Following is our detailed contact information and the USAC action which we are appealing:

Appellant/Organization Name: Boston Public Library/MBLN
Contact Person Name: David Leonard, Chief Technology Officer
Billed Entity Name: Boston Public Library/MBLN
Billed Entity Number: 149096,
Contact Mailing Address: Boston Public Library
700 Boylston Street
Boston, MA 02117
Contact Telephone Number: 617-859-2034
Contact Fax Number: 617-536-2853
Contact Email address: dleonard@bpl.org
Funding Year: 2007

¹ For ease of review, we are combining herein the appeal of all four Administrator's Decision Letters (ADLs) issued on the same date—February 25, 2011.

Relevant Form 471 and Funding Request Numbers:

Form 471 Application Numbers	Funding Request Number(s)
558489	1540150, 1540160, 1540152
558675	1540605
558737	1540774, 1540835
559648	1543591, 1543600

Request for Review of Administrator's Decision and Subsequent Actions:

Administrator's Decisions on Appeal of USAC's Funding Year 2007 Commitment Adjustments in the form of Notification of Improperly Disbursed Funds Recovery Letters and subsequent Demand Payment Letters and Notification of Withholding of Action Letter.

Text from Administrator's Decision Letters:

- During the site audit, USAC determined that the Boston Public Library did not have an approved technology plan in place at the time of services requested for FY 2007. This is a program violation. USAC contacted you on October 12, 2010 to recover the improper disbursement of funds. The appeal letter confirms that on January 22, 2009, you received a notification from USAC auditors that a letter of technology plan approval did not exist for the services requested for in FY2007. You further acknowledge that Boston Public Library did not discover this until it was identified by the auditors. You further state this was due to change in personnel at the Library and the communication gap which resulted there of between Boston Public Library and the technology plan approvers. The fact remains that Boston Public Library did not have an approved technology plan in place at the time of service being requested for FY 2007. Since, this does not cure the Program violation as well as there is no new information provided on appeal to show that USAC has erred in its initial determination, your appeal is denied.

1. Background

Founded in 1848 by an act of General Court of Massachusetts, the Boston Public Library (BPL) was the first free municipal library in the United States and the first to open branches. Today, 26 branches and the main central library in Copley Square are open to serve all the citizens of Massachusetts. Over 2.2 million patrons visit the BPL each year, many in pursuit of research material, others looking for an afternoon's reading, still others for the magnificent and unique art and architecture.

In addition to its 6.1 million books, the library boasts over 1.2 million rare books and manuscripts, a wealth of maps, musical scores and prints. Among its large collections, the BPL holds several first edition folios by William Shakespeare, original music scores from Mozart to Prokofiev's "Peter and the Wolf;" and, in its rare book collection, the personal library of John Adams.

It is important to note that the importance of and demand for public library services has risen dramatically during this prolonged economic recession. Key BPL measures – circulation, public wireless

use, digital downloads, and web visits – have all reached record levels over the past two years while funding plunges to a 10-year low. Such an undue hardship caused by this demand for funds recovery must not only be measured in dollars but also in the potential loss of public service to all the citizens of Massachusetts. The E-rate program has been and, we hope, will continue to be a significant asset to the services we are able to provide for all of Massachusetts.

1a. Background—Relevant Technology Plan Dates

Prior to the December 4 and December 13, 2006 filing of the establishing Forms 470 that correspond with the Form 471 applications cited above, Boston Public Library had prepared (written) a technology plan to cover the period from July 1, 2007 through June 30, 2008.

On November 14, 2006, the technology plan (which contained all five requirements elements of the plan) was approved by the Boston Public Library Board of Trustees at their regularly scheduled Board meeting. (See Attachment 1 for the relevant Board agenda (Item 5) seeking technology plan approval and the meeting minutes which show Board action approving the technology plan).

On November 16, 2006, subsequent to the Board Meeting where the technology plan was approved, the Boston Public Library President at that time, Mr. Bernard A. Margolis, signed the Technology Plan.

On that same day, November 16, 2006, the Boston Public Library submitted its technology plan to the Massachusetts Board of Library Commissioners (the certified tech plan approver for Massachusetts libraries). See Attachment 2 for a copy of the transmittal letter.

In summary, the technology plan had been prepared (written) prior to submitting the establishing Forms 470; the technology plan had been submitted to the Boston Public Library Board of Trustees for approval; the technology plan was approved by the Board; the technology plan was signed by the Boston Public Library President; and, the technology plan was submitted to the Massachusetts Board of Library Commissioners (the certified tech plan approver) seven and a half months prior to the start of services on July 1, 2007.

1b. Background—Personnel Changes and Death of former Acting Chief Technology Officer

The technology plan in question was prepared, in cooperation with other Boston Public Library staff, by Ms. Carol Wu, the Chief Technology Officer during the November, 2006 timeframe.

Ms Wu tendered her resignation on January 19, 2007.

She was succeeded by Mr. Henry Bernasconi who served as Acting Chief Technology Officer beginning March 29, 2007.

Unfortunately, Mr. Bernasconi became terminally ill and was on medical leave to seek treatment from May through November, 2008 and again from October, 2009 through early June 2010.

On June 8, 2010 Mr. Bernasconi sadly passed away from his illness.

On July 10, 2009, Mr. David Leonard was hired as Ms. Wu's replacement as Chief Technology Officer (a gap of nearly 30 months from the date of her departure to the point at which a full-time employee was once again able to address technology-related issues for the library).

1 c. Background—Audit

On January 22, 2009, Boston Public Library received notification of a finding by USAC Auditors (KPMG) that a letter of technology plan approval did not exist for certain services for which funding was requested in Funding Year 2007.²

Upon receipt of this notification by the auditors, library staff contacted the Massachusetts Board of Library Commissioners (the tech plan approver) to understand what had taken place subsequent to Boston Public Library's submission of its technology plan in November of 2006. The staff person at the Board of Library Commissioners responsible for technology plan approvals, Mr. Paul Kissman, indicated that his notes showed that he had reached out to Ms. Wu on January 2, 2007 via phone to discuss the submitted technology plan and had left a message for her. It is important to note that Ms. Wu, the Library President, and the Library Deputy Director were in the process at that time of discussing Ms. Wu's future with the library which ultimately led to her resignation on January 19, 2007. We understand that the call to Mr. Kissman was not returned during this short period of time prior to Ms. Wu's departure.

Mr. Leonard, the current Chief Technology Officer, has learned that after the initial call was made by Mr. Kissman of the Board of Library Commissions to Ms. Wu, no subsequent action was taken by Mr. Kissman to contact Boston Public Library—either by phone or in writing—to either accept or reject the technology plan which is their normal practice. Therefore, other administrators and staff at Boston Public Library were never aware that a technology plan approval letter had not been received since it was Ms. Wu who was the person responsible for the interface with the State's Board of Library Commissioners. Note the communication in Attachment 2 from Ms. Wu to the Board of Library Commissioners transmitting the technology plan for approval.

As a result of the circumstances outlined above, we acknowledge that a letter from the technology plan approver (the Massachusetts Board of Library Commissioners) was not received by the applicant (Boston Public Library) prior to the start of services. However, we call the Commission's attention to the fact that the technology plan (containing the five required elements) had been prepared, approved by its Board, and submitted to the state for approval.

² The relevant Funding Year 2007 application numbers are cited in the table on page 1.

2. Discussion

The Commission has provided relief in prior situations where the applicant had substantially similar situations concerning technology plan documentation compliance. In those situations, the FCC found that:

- a. where applicants missed an FCC deadline due to personal staff emergencies, inadvertent errors, circumstances beyond the applicant's control, because of an illness of the E-rate staff person, or where there was no fraud, waste, or abuse found, waivers were granted;
- b. where violations do not constitute substantive violations of the Commission's rules but instead are procedural violations, a complete rejection of applications is not warranted;
- c. outreach efforts by USAC needed to be enhanced to better inform applicants of the technology plan requirements and so created a new 15-day opportunity to provide correct technology plan documentation; and
- d. that waiver is appropriate when special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.

Additional Observation

In September, 2010, the FCC in its *Sixth Report and Order* changed the rules with regard to technology plan requirements such that plans are no longer required for Priority One services—the type of services covered under the Forms 471 cited above and for which demand for repayment has been issued.

2a. FCC Precedent Related to Staff Emergencies, Illness, Death, and Circumstances Beyond the Applicant's Control and 15-day Remedy to Cure Documentation Requirements (FCC 10-122, Academy of Math and Science et al), (FCC 06-54 Bishop Perry Middle School Order), (FCC 07-60 Academy for Academic Excellence Order), (DA 08-2376, Acorn Public Library District Order)

In FCC 10-122—Requests for Waiver and Review of Decisions of the Universal Service Administrator by the *Academy of Math and Science, Tucson, AZ, et al.*—the FCC addressed similar situations dealing with missed deadlines due to staff emergencies, death, and circumstances beyond the applicant's control. The decisions in that Order were based on the precedent which the FCC set in 2006 and 2007 in the *Bishop Perry Order* and the *Academy for Academic Excellence Order*, respectively, in which they granted waivers to applicants who missed an FCC deadline specifically “due to technical malfunctions, school reorganizations, a misunderstanding related to the filing deadline, **personal staff emergencies** [emphasis added], inadvertent errors, or **circumstances beyond their control** [emphasis added], including inclement weather. Consistent with the precedent established in those orders, in 2008 the Bureau released the *Acorn Public Library District Order*, in which it granted waivers of the FCC Form 471 filing window deadline to applicants that: (1) filed their FCC Form 471 applications within 14 days after the FCC Form 471 filing window deadline; (2) filed their FCC Form 471 applications late **because of an illness of the E-rate staff person or the death of a member of his or her family** [emphasis added]; (3) filed their FCC Form 471 applications late due to delays caused by circumstances beyond their control;

or (4) filed their FCC Form 471 applications on time or within 14 days of the filing window deadline but failed to file their FCC Forms 470 or 471 certifications on time.

Specifically the FCC in remanding these applications back to USAC for processing indicated that waiver was appropriate when special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.

In the *Academy of Math and Science Order*, we believe the FCC, in remanding those applications for processing where a deadline was missed due to illness, death, and circumstances beyond the applicant's control, identified for the SLD the parameters under which funding commitments could be approved in similar situations.

While the circumstances vary slightly, the general findings of the FCC that waivers can be granted in such instances should apply to the facts in this situation.

Also note that, in *Academy for Academic Excellence*, the FCC directed USAC to provide a 15-day period in which applicants were allowed to address any deficiencies in their supporting documentation. See further comments about the 15-day period to cure in Item 2c below.

2b. FCC Precedent Relative to Substantive Violations vs. Procedural Violations

Consistent with the FCC's position in the *Academy Order* (FCC 10-122) that missing form deadlines did not "constitute substantive violations of the Commission's rules, but instead [were] procedural violations, and therefore, a complete rejection of the[se] applications [was] not warranted," we believe the absence of a technology plan approval letter which "fell through the cracks" due to personnel issues surrounding Ms. Wu's departure and the illness and subsequent death of Mr. Bernasconi also falls into the category of a procedural violation but does not constitute substantive violations of the Commission's rules. As we have described, a technology plan which contained all of the required elements was prepared (written) and submitted in more than a timely fashion with the technology plan approver for the state. And, upon receipt of the audit report citing the absence of the technology plan approval letter, Boston Public Library took steps to obtain the document which provides retroactive documentation of approval to the service start date. (See Attachment 3).

In addition, with regard to the Technology Plan violations in the *Brownsville Order* (see Item 2c. below), the FCC once again (similar to the *Academy Order* cited above) indicated that "[the] violations [surrounding technology plan approval] were procedural, not substantive [and that] rejection of these Petitioners' E-rate applications is not warranted." We believe that in our situation, the absence of the technology plan approval letter is procedural and not substantive since the technology plan had been timely prepared, was approved by our Board of Trustees and President, and was submitted to the state tech plan approver seven and a half months prior to the start of services. As the FCC noted in *Brownsville* "USAC denied their applications not because the applicants refused to develop or obtain approval of their technology plans, but because Petitioners failed to show that they had met the deadlines when USAC requested technology plan documentation."

In this instance, the violation was purely procedural, and no substantive violation or intent to avoid either the preparation or approval process has ever been alleged.

2c. FCC Precedent for Processing in the case of Technology Plan Violations (FCC 07-37)

The FCC specifically addressed technology plan violations in FCC 07-37 (*Brownsville Independent School District, Brownsville, TX et al.*). In *Brownsville*, USAC had denied funding requests that were not supported by an approved technology plan. The FCC waived, in part, their technology plan rules and remanded the underlying applications to USAC for further processing/consideration consistent with the Order. In that Order, the FCC also said that, “beginning with applications for FY 2007, we direct USAC to enhance its outreach efforts as described herein to better inform applicants of the technology plan requirements and to provide applicants with a 15-day opportunity to provide correct technology plan documentation.

The FCC made clear in the *Brownsville Order* that program beneficiaries, dealing with program complexities, were often denied support because of simple mistakes. The FCC specifically indicated that additional outreach was necessary and directed USAC to give a 15-day opportunity to correct technology plan documentation while the Commission undertook further action to improve the E-rate program. Yet, in this situation where the lack of a technology plan approval letter was discovered during the KPMG audit, the applicant was not given that opportunity. So, in a pre-commitment situation—where funds have likely not yet been spent—applicants are allowed to cure technology plan documentation issues. Yet, in a post-commitment situation where budgeted funds have been spent and services have been received, Boston Public Library was not given the same opportunity. As stated in the previous section 2b, in fact upon learning of the absence of the technology plan approval letter, Boston Public Library took steps to obtain the approval document. Without being afforded the same opportunity to correct technology plan documentation, Boston Public Library is being directed to repay funds at a time when doing so will cause extreme hardship.

2d. FCC Precedent Relative to Public Interest and Hardship

In the FCC’s most recent Order dealing with technology plan compliance issues, DA 10-2424, *Al-Ishan et al.*, the Commission cited the standards of the *Brownsville Order* and once again waived its rules both for good cause shown and where the particular facts made strict compliance inconsistent with the public interest. In addition, the Commission cited its ability to take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. In the case of Boston Public Library, repayment of funds because a technology plan approval letter was not received prior to the start of the funding year—even when a plan had been prepared and approved by its Board of Directors—would not be in the public interest. Due to budget constraints over the last 10 years, Boston Public Library has had to take drastic measures to reduce both staff and services. Should we be required to re-pay the nearly half million dollars associated with these previously funded applications, severe measures would be required negatively impacting not only the residents of Boston, but of the state as well.

Historic Funding Levels

The Boston Public Library (BPL) was deeply affected by the post-9/11 recession era budgets of FY2003 and FY2004, losing nearly \$7.6 million in revenue and shedding over 100 full-time positions. The Library gradually recovered over the next five fiscal years.

Fiscal Years 2010 and 2011

The funding recovery, however, was short-lived. The BPL experienced a precipitous drop in funding from FY2009 to FY2010 of nearly \$7 million. An additional revenue loss of over \$1 million from FY2010 to FY2011 created back-to-back years of sharply reduced revenues that necessitated a range of drastic reductions across the BPL system, including:

- Loss of 90 positions system wide
- Reduction of collections budget (books, CDs, DVDs, electronic media) by over 25%
- Reduction of hours, public service points, and programming
- Delay of critical improvements, including IT infrastructure upgrades
- Reduction of staff development and training
- Reduction of key digitization initiatives
- Loss of service contracts and other cost reductions

Fiscal Year 2012

Based on the information available today, the BPL will experience the third consecutive year of reduced revenues in FY2012 with an anticipated funding level of approximately \$34.4 million, an \$8.6 million revenue loss since FY2009. The FY2012 estimated revenue shortfall will create a budget gap of \$1.5 million and will again necessitate further reductions to the operating budget including:

- Eliminating Sunday public service at the landmark Central Library in Copley Square
- Reducing the collections budget (books, CDs, DVDs, electronic media) by 6%
- Holding up to 15 positions vacant throughout the library system

Should revenues drop below current estimates, the BPL will be forced to consider the following options in FY2012:

- Staff layoffs
- Branch closures in up to 4 neighborhoods

Impact of E-rate Support

E-rate funding has been a critical component of BPL's annual operating budget almost since its inception. E-rate funding has supported many core telecommunications and information technology services including:

- Telecommunications services for Voice and Data transmission
- Internal Connections support for Wired and WIFI Networks, Switches, Routers & Firewalls
- A Voice Over IP Telephone infrastructure

3. Further Observations

In addition to providing relief due to public interest in *Al-Ishan*, the Commission waived the technology plan rules in situations where the petitioners failed to show that they had an approved technology plan in place for the relevant funding year, where the applicant's board had approved technology plans, and where applicants had state-level approved technology plans in place in prior years. It is worth noting that the services requested by Boston Public Library in Funding Year 2007 were essentially the same as those requested for Funding Year 2006 and 2008 and for which years technology plan approval letters were received prior to the start of services. We note again the unusual circumstances in Funding Year 2007 that led to the gap in receipt of the technology plan approval letter prior to the start of services.

Further, in *Al-Ishan, et al.*, the FCC stated that the purpose for having an approved technology plan is to ensure that the plan is based on the reasonable needs and resources of the applicant and is consistent with the goals of the E-rate program. We once again note that a technology plan had been prepared prior to procurement (the submission of the corresponding Forms 470).

We believe it is also important to note that recently, in the September 23, 2010 release of the FCC's *Sixth Report and Order*, the FCC has taken definitive steps to do exactly what they indicated they would do in the *Brownsville Order* in terms of improving the program as it relates to technology plans such that applicants would not be denied funding due to simple mistakes. In the *Sixth Report and Order*, the FCC has removed, for the purposes of the E-rate program, the requirement for any technology plan or approval for Priority One services (the subject of this funds recovery action).

4. Subsequent Actions/Procedural Matters

At the same time that the rules for having technology plans for Priority One services have been removed; USAC is not only seeking reimbursement because a technology plan approval letter did not exist, they have sent a Notice of Withholding Action letter which threatens the dismissal of current applications if re-payment is not made BEFORE the applicant has the opportunity to exercise their rights to seek review of the funds recovery decision of the Administrator. This Withholding Action is proceeding in spite of the fact that the FCC has specifically stated in the *DCIA Order*³ and the *Fifth Report and Order* that their rules call for such actions to be tolled given the harsh nature of the consequences if the applicant has timely filed a challenge. Specifically, the *Fifth Report and Order* (FCC 04-190) states the following in paragraph 43:

"43. Applications will not be dismissed pursuant to our red light rule if the applicant has timely filed a challenge through administrative appeal or a contested judicial proceeding to either the existence or amount of the debt owed to the Commission. Our recent *DCIA Order* expressly notes that appeals made to USAC shall be deemed administrative appeals. Our rules thus

³ FCC 04-72, par. 6: "We believe that a timely written challenge to a debt should preclude consideration of the debt for purposes of the red light rule. Accordingly, where an applicant has filed a timely administrative appeal, or a contested judicial proceeding, challenging either the existence of, or the amount of, a debt, such debt shall not be considered delinquent for purpose of the red light rule." (With footnote citing 31 C.F.R. § 285.13(d)(2)(iii) (a debt is not delinquent for purposes of the denial of financial assistance to delinquent debtors under 31 U.S.C. § 3720B if it is subject to time-filed administrative or judicial challenge)).

provide the opportunity to contest any finding that monies are owed to the fund, and thereby toll the potentially harsh consequences of the red light rule. This addresses the concerns raised by some parties that deferring action on pending requests when there is an outstanding commitment adjustment action would unfairly dissuade parties from pursuing their legitimate appeal rights” [emphasis added].

Please note that out of an abundance of caution given the potential conflict between the language in the Demand Payment Letter and the appeal language in the Administrator’s Decision Letters, Boston Public Library filed a challenge with the FCC within 30 days of the demand repayment letter to toll any further actions and/or penalties. We also further stated in that challenge that this appeal of the Administrator’s decision would be filed thereby exercising our rights under the program rules to appeal the decision of the Administrator regarding funds recovery.

Something that could have been so easily dealt with by allowing the applicant 15 days to provide the necessary documentation has now turned into 1) a demand for repayment before the applicant has an opportunity to exercise its right to request a review of the Administrator’s decision within the 60 days afforded them under the rules, 2) the ignoring of the FCC’s rules for tolling the repayment of funds while a challenge is underway, and 3) sending a Notice of Withholding Action that calls for the dismissal of current applications if funds are not repaid BEFORE the review of the Administrator’s decision can be conducted by the FCC—even though the initial challenge was filed within 30 days of the Demand Payment Letter.

5. Summary

1. There was no intent to harm the program. There was no waste, fraud or abuse. A technology plan had, in fact, been prepared and was approved by the Boston Public Library Board of Trustees prior to submission of the relevant Forms 470 and was subsequently—upon approval by the Trustees and signature by the Library President—submitted to the state’s Board of Library Commissioners which serves as the state’s technology plan approver.
2. The circumstances which led to the departure of Ms. Wu along with the unfortunate illness and death of Mr. Bernasconi left an institutional gap in staffing which meant that the voicemail left for Ms. Wu by the state’s technology plan approver—The Massachusetts Board of Library Commissioners—was not returned and the Board of Library Commissioners provided no additional contact—either oral or written—leaving other staff at the Boston Public Library with no knowledge of the lack of receipt of a technology plan approval letter.
3. The Funding Request Numbers cited in this document were initially funded which suggests that there were no other deficiencies identified in the application review process.
4. There is no additional impact to the federal Universal Service Fund given that funds have already been disbursed for the services received.
5. Boston Public Library was never given “a 15-day opportunity to provide correct technology plan documentation” as the FCC directed USAC to do in 2007 in the review process. However, as noted

earlier in this document, upon receipt of the audit report, Boston Public Library took steps to obtain the necessary documentation.

6. There was no intent by Boston Public Library to circumvent the technology plan approval requirement. In fact, the plan was prepared, approved by the BPL Board, and submitted to the State for approval seven and a half months prior to the start of service.


Remedy Requested

Given that the technology plan had been prepared (written) prior to procurement and that all five elements of the technology plan had been addressed and was submitted for approval to the State's technology plan approver seven and a half months prior to the start of services thereby serving its intended purpose of thoughtful planning for effective use of universal service funds; and, given that the communications failure between the technology plan approver and Boston Public Library was at the same time as staff resignation, illness, and ultimately death; we ask the Commission to consider these facts in their review of the Administrator's decision regarding funds recovery or alternatively, if necessary, to waive the Commission's rules given their ability to do so in special circumstances given that technical compliance with the rule requiring the approval by a third party prior to the start of services does not further the purposes of Section 254(h) or serve the public interest in this situation.

Further, we ask that any dismissal of current applications or penalties that have been improperly imposed while ignoring the FCC's *DCIA and Fifth Report and Orders* to toll such actions when challenges have been timely filed, be reversed.

Should you require any additional information in reviewing this request, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read "D. Leonard", with a stylized flourish at the end.

David Leonard
Chief Technology Officer

cc: USAinet, Inc., Lightship Telecom, Verizon Massachusetts

Attachments 1-3